NO. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

90-3230

FESTUS SYDER, Petitioner

V.

THE UNITED STATE OF AMERICA, Respondent

APPLICATION FOR LEAVE TO PROCEED ON PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The Petitioner, FESTUS SYDER, asks leave to file the attached Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the United States Court of Appeals for the Fifth Circuit. No affidavit is attached in as much as the United States District Court appointed counsel for Petitioner under the Criminal Justice Act of 1964 to represent the Petitioner on appeal to the United States Court of Appeals for the Fifth Circuit due to his indigency.

Respectfully submitted,

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OCTOBER TERM 1990

FESTUS SYDER

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V.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court clearly abused its discretion in increasing the offense level by two (2) levels ostensibly for "Willfully, Obstructing or Impeding Proceedings" in that the alleged conduct in question, even if true, as a matter of law, falls outside the reach of § 3C1.1 of the Sentencing Guidelines.

2. Whether the district court clearly abused its discretion in increasing the offense level by two (2) levels pursuant to § 3C1.1. of the Sentencing Guidelines in that there was no evidence that the defendant had any complicity in the conduct allegedly constituting an obstruction of the administration of justice.

3. Whether the district court clearly abused its discretion in not awarding the defendant a two (2) level decrease for Acceptance of Responsibility in the present case.

4. Whether the district court erred in failing to comply with Rule 11(c)(1), Fed. R. Crim. Pro., in that the defendant was not admonished as to "the effect of any ... supervised release term."

5. Whether the trial court abused its discretion in denying the Defendant's Motion to Allow Withdrawal of Plea of Guilty.

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The United States of America

Festus Syder

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

FESTUS SYDER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 90-2299, United States v. Festus Syder is attached as Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on April 1, 1991, entered its opinion affirming the judgment of the District Court. Jurisdiction of the Court is invoked under §1254(1), Title 28, United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall ... be deprived of life, liberty, or property, without due process of law ...

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ...

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below:

Festus Syder, the defendant, was charged in a four count indictment with conspiracy to import into the United States in excess of 100 grams of heroin; conspiracy to possess with intent to distribute in excess of 100 grams of heroin; importation into the United States in excess of 100 grams of heroin; and with possessing with the intent to distribute in excess of 100 grams of heroin, proscribed, respectively, by **Title 21, U.S.C., §§ 952(a); 841(a)(1); 952(a) and 841(a)(1) (R.I-167-168)**.

Mr. Syder entered a plea of guilty as to each count on September 26, 1989. On February 26, 1989, Syder was sentenced to a period of incarceration of sixty (60) months and assessed a period of supervised release of five (5) years (R.I-33).

On March 20, 1990, pursuant to **Rule 4(b), Fed. R. App. Pro.**, the undersigned counsel sought leave of court to extend the time for the filing of the notice of appeal in that previous defense counsel had not perfected appeal and the ten (10) day period provided by **Rule 4** had lapsed prior to the undersigned counsel's appointment (R.I-25-28). The motion was granted on the same date it was filed - March 20, 1990 (R.I-18).

In an opinion dated April 1, 1991, the United States Court of Appeals for the Fifth Circuit rejected the petitioner's contentions advanced in his brief on direct appeal and affirmed his conviction.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States government alleging a violation of **United States Code, Title 21, §§952(a); 841(a)(1); 952(a) and 841(a)(1)**.

QUESTIONS ONE, TWO, AND THREE RESTATED

1. Whether the district court clearly abused its discretion in increasing the offense level by two (2) levels ostensibly for "Willfully, Obstructing or Impeding Proceedings" in that the alleged conduct in question, even if true, as a matter of law, falls outside the reach of § 3C1.1 of the Sentencing Guidelines.

2. Whether the district court clearly abused its discretion in increasing the offense level by two (2) levels pursuant to § 3C1.1. of the Sentencing Guidelines in that there was no evidence that the defendant had any complicity in the conduct allegedly constituting an obstruction of the administration of justice.

3. Whether the district court clearly abused its discretion in not awarding the defendant a two (2) level decrease for Acceptance of Responsibility in the present case.

STATEMENT OF FACTS

As the record reflects, Mr. Syder was originally represented by Charles Medlin who appeared as counsel of record for the rearraignment and entry of pleas of guilty on September 26, 1989 (R.II-2). During the rearraignment proceeding, it was brought to the Court's attention that Syder took the "position that he did not know that what he was actually bringing in was heroin" (R.II-6). The Court informed Syder, apparently, in reliance upon the doctrine of "deliberate ignorance" or "conscious avoidance" that he would nonetheless be charged with knowledge of the contraband. As the Court stated,

> "You are responsible for knowledge that you could have had, but don't learn all the facts, like exactly what's in the balloon, that doesn't -- we assume that you know everything you could have known and deciding not to find out what's in the balloon doesn't help you because, we know you could have known what was in the balloon if you wanted to" (R.II-6).

Mr. Syder responded, "Well, yes, *but I was forced*, I didn't know what it was" (emphasis added). The defense indicated that he had no further questions except, "Just other than what we have said" (R.II-6).

Later in the proceeding, Syder stated that his mother lived in Nigeria and was seriously ill and in an effort to raise money to purchase a ticket to travel home, he contacted Ken Alipko, a "friend," who arranged for the purchase of a ticket in return for Syder locating some of Alipko's relatives in Nigeria and bringing a package back for Alipko to the United States (R.II-10). After visiting his mother in Nigeria, Syder arrived at the airport to return to the United States and was met at that location by Alipko's operatives who escorted him from the airport and drove him

"straight to their house" (R.II-12). Over Syder's protest, he was persuaded to swallow several balloons. Syder told Alipko's cohorts that "It will kill me. I don't know what this is" (R.II-13). Nonetheless, all the balloons were swallowed. Syder stated that he was then escorted back to the airport where he was instructed "not to say anything to anybody while I was on the plane" (R.II-14). Syder related that when he arrived in New York, he felt dizzy and scared and "luckily enough" a customs officer was able to discern that perhaps Syder had taken something. Syder consented to the taking of an x-ray and several days later, after having been hospitalized, passed the balloons that he had swallowed in Nigeria (R.II-14-16). A decision was then made to cooperate with the government and implicate Alipko (R.II-16-19). As will be demonstrated **infra**, Syder fulfilled his obligation to the government and honestly testified against Alipko and otherwise cooperated with the prosecution and law enforcement officials.

On November 17, 1989, Mr. George O. Jacobs filed a Motion for Substitution of Counsel which was approved by Syder and his former attorney, Charles W. Medlin, and also caused to be filed the Defendant's Motion to Allow Withdrawal of Plea of Guilty. As is stated in the aforementioned motion and the attached affidavit in support thereof, after consulting with Mr. Jacobs, Syder and his then new counsel believed that a meritorious defense existed as to all charges lodged against him. As is stated in the motion,

> "Both the defendant and the newly retained counsel feel that the defendant has a meritorious defense of duress in that the defendant was forced to commit the offense alleged herein by threats against his life and the lives of members of his family. The defendant was not able to make the appointed counsel fully understand this defense and the surrounding facts which occurred in Nigeria and for this reason and based upon appointed counsel's recommendation, the defendant entered a plea of guilty. Defendant now understands that duress by threat of physical body (sic), injury or death is a defense to the allegations alleged in the indictment and the defendant wishes to be allowed to raise this defense before a jury in order that he may be guaranteed due process under the Fourteenth Amendment of the United States Constitution and that he may have a jury enter a finding upon his defense of duress. The defendant now realizes that he should not have entered a plea of guilty to an offense to which he did not willfully and intentionally commit of his own volition and free will" (R.I-64-65).

In a tersely worded order signed on December 18, 1989, the District Court ruled that "Festus Syder's motion to allow him to withdraw his plea of guilty is denied" (R.I-62).

Subsequently, on January 11, 1990, the government caused to be filed a Motion to Revoke Release requesting that an arrest warrant issue for Syder's arrest due to the interception by customs officials of a bogus passport bearing Syder's photograph, but in the name of a third party (R.I-57-58). On the same date, the District Court issued an order for the arrest of Syder (R.I-56).

On February 20, 1990, the defendant's Motion to Allow Withdrawal of Plea of Guilty was filed. In this second motion Syder recounted the substance of the first Motion to Allow Withdrawal of Plea of Guilty filed on November 17, 1989 and further requested leave of court for the withdrawal of the plea of guilty due to the false passport revelation previously discussed. Syder was of the position that he had no knowledge that his sister had caused to be sent a false passport and that he should not be held accountable for her unilateral conduct. As was stated in the motion,

> "[t]he defendant, therefore, was placed in the untenable position of now being sentenced by a Court that will be in an entirely different frame of mind regarding defendant's sentence had not the sister took it upon herself to mail the defendant an illegal passport." This is a fact situation that the defendant did not bargain for and was not aware of at the time of his plea of guilty on September 26, 1989. It is the defendant, Festus Syder's position that the Court cannot fairly and justly enter a proper sentence for the defendant, at this time, in view of the fact that the Court has expressed its belief in the defendant's complicity in the procuring of the illegal passport. This was not a condition that the defendant agreed to when he entered his plea of guilty in this cause. Because the attempted importation by his sister of the illegal passport cannot help but have an effect upon the mind of the Court in a negative manner, as far as the sentencing of the defendant is concerned, the defendant feels that it is unfair and unjust for the Court with knowledge of the new set of facts and circumstances for which the Court has ordered the defendant confined, to assess the punishment at this time" (R.I-38-48 at 41).[1]

On February 26, 1990, the Court considered the second Motion to Allow Withdrawal of Plea of Guilty and denied the same (R.IV-7). While the focus of the District Court's comments clearly was on the assertions brought forward in the second motion as it

[1] It is to be noted that in a hearing conducted on January 17, 1990, the Court remanded the defendant into the custody of the Attorney General due to the passport incident.

related to the passport incident, the Court did briefly refer to the duress issue contained in the initial Motion to Allow Withdrawal of Plea of Guilty:

> "The offense with which Mr. Syder is charged is serious enough, I'm not going to worry about his sister and the passport, that's Nigeria's problem and his problem, but he's going to be sentenced for what he did and pleaded guilty to it. And he now desire (sic) to withdraw the plea is understandable, I guess. But he was under no pressure at the time, he chose voluntarily to admit his guilty (sic), he admitted it. He knew at the time that it wasn't a conditional plea or anything like that, and we went through the whole business with him. He went through the whole thing or something, changed his lawyer and now wants to undo it. But the circumstance under which he was obliged to return the heroin, there's a difference between not knowing he was going to have to swallow it and risk his life and being - that's where the duress came from. The duress was the means, not the object. The motion to withdraw the plea is denied" (R.IV-6-7).

Early on in the sentencing hearing, when defense counsel Jacobs broached the subject of duress and the previously filed and denied Motion to Allow Withdrawal of Plea of Guilty, the Court stated, "We've been through that" (R.IV-4). It is to be noted, however, that at no time did the Court make any findings of fact or conclusions of law relative to the same, nor does the record reflect that the District Court and the parties had in fact "been through that."

As was stated above, except for the brief aforementioned dialogue, the District Court gave very little consideration of or treatment to Syder's request to withdraw his plea of guilty. No findings of fact or conclusions of law were entered, nor was any inquiry made of the government as to whether it would be prejudiced or inconvenienced by allowing Syder to withdraw his plea of guilty and proceed to trial.

The total offense level computed by the United States Probation Department was a level 24. This was arrived at by starting with a Base Offense Level of twenty-six (26) (§ 2D1.1 of the Sentencing Guidelines). A four (4) level decrease was awarded as an Adjustment for Role in Offense. The offense level was next increased by two (2) levels purportedly as an Adjustment for Obstruction of Justice. As reflected in the Pre-Sentence Investigation Report,

> "[t]he Government seized a passport with the defendant's picture and having a false name which was sent to the defendant by his sister. It is *suspected* the documents were to be utilized by the defendant to flee the jurisdiction of the court. The defendant denies requesting the passport. This action is viewed as an attempt to impede the administration of justice during the prosecution of the instant offense. Per Section 3C1.1, the offense level is increased by two" (PSI at 6)(emphasis added).

Finally, a two level decrease for Acceptance of Responsibility was denied due to the aforementioned allegation of obstruction of justice. Again, as reflected in the Pre-Sentence Investigation Report,

> "[a]lthough the defendant initially demonstrated a recognition and affirmative acceptance of personal responsibility for the instant offense, his actions in securing false documentation to flee suggests he has not. Per application (sic) Note No. 4, page 3.24 of the guidelines, 'Conduct resulting in an enhancement under 3C1.1 (willfully obstructing or impeding proceedings) ordinarily indicates the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both 3C1.1 and 3E1.1 may apply" (PSI at 6).

It is submitted that the correct Total Offense Level in the case at bar is a twenty (20). This figure is arrived at by subtracting four (4) levels from the Base Offense Level of twenty-six (26) for Adjustment for Role in the Offense which brings the score to twenty-two (22). No increase for an alleged obstruction of justice is warranted under the facts and the law. Finally, Syder was clearly entitled to a further decrease by two (2) levels for his Acceptance of Responsibility.

At the outset it is conceded that, inexplicably, no objections were lodged by defense counsel below to the calculus employed by the probation department in paragraphs 23 and 24 of Pre-Sentence Investigation Report which addressed the Adjustments for Obstruction of Justice and Acceptance of Responsibility, respectively. In any event, the record clearly establishes error regarding the same and this is so even if a plain error standard of review is utilized. *See* **United States v. Ebertowski, 896 F.2d 906 (5th Cir. 1990)**.

As the record reflects, a hearing was conducted on January 17, 1990 due to the rearrest of Syder in the interim between his rearraignment and sentencing. It is irrefutable that Syder cooperated with federal officials upon his arrival in New York from

Lagos, Nigeria, assisting in the arrest and later prosecution of Ken Alipko. Syder testified against Alipko at the latter's trial and the government openly acknowledged that not only would a conviction "had been much more difficult if not impossible" had Syder not testified, but further "stipulated that defendant has accepted responsibility for his actions" (*Government's Response to Pre-Sentence Report of Defendant Syder*, (R.I-50-52).

Mr. Syder was released on bond pending sentencing and as stated above, was rearrested on January 17, 1990. In a document styled Motion to Revoke Release, the government averred, in pertinent part, that

> "[o]n or about December 30, 1989, U.S. Customs agents came into possession of a Nigerian passport issued December 13, 1989, bearing Defendant's picture but in the name of a third party. Also accompanying this passport was a letter from Defendant's sister to Defendant. The passport was being sent to him 'in case of any urgency'" (R.I-60).

The government sought the arrest of Syder and "that he be brought before the Court to show cause why the conditions of release should not be revoked" (R.I-61). At the January 17, 1990 hearing, the district court was informed that customs officials in New York City had intercepted a Nigerian passport that evidently bore Syder's photograph, but the name of a third person (R.III-2). Defense counsel asserted that Syder was

> "getting blamed for something that is a unilateral act on the part of the sister. He had no knowledge she was doing this, your honor. He didn't participate in any way in requesting this. It came into customs at New York City and was intercepted there. An agent who had worked on the previous case recognized picture and then knew it was a fake passport. But Mr. Syder didn't know that his sister was doing this. We have a letter from her, your honor, that Mr. Davidson (prosecutor) has given me that accompanied the passport. If you will look at the letter, in the letters it says that she's tried to contact him and she has not been able to do that" (R.III-2).

In reply, the prosecutor stated the following:

> "Judge, that was one of the things I was going to present to you as we have a letter from his sister to Festus and a letter from his sister to, apparently, a doctor here in Houston who's going to act as an intermediary. In several places it does indicate she has tried to get in touch with him unsuccessfully. The one thing that makes me thing (sic) otherwise is on the third page where there's a specific reference, as I mentioned in my previous letter, I have done all that is humanly possible. And that's the only thing the government would be able to affirmatively present to the court to indicate he had

> an awareness of some awareness of what was to take place" (R.III-2-3).

As the record reflects, defense counsel offered to have Syder sworn and testify under oath as to the unilateral nature of the sister's act and his lack of knowledge as to her conduct (R.III-4). The district court evidently was not interested in hearing from Mr. Syder. Defense counsel also pointed out that the *Motion to Revoke Release* filed by the government did not allege any violation of the terms and conditions of release. The Court stated, "[y]ou know, he doesn't have to commit a crime, *all he has to do is make me nervous*" (R.III-5)(emphasis added).

Relative to the letters shown the district court which, inexplicably, were not included in the present record on appeal, the district court evidently paid little attention to their contents. As the Court stated, "... the letters I don't think add or subtract either way, certainly not definitely exculpatory. And a lady who will obtain a fake passport will fake a letter to her brother" (R.III-6). It appears that the Court's decision ultimately to revoke bond was based on nothing more than conjecture and speculation:

> "I have a very difficult time, not with the letters, but believing that his sister decided all on her own without consulting directly or indirectly with Mr. Syder that an alternative passport should be obtained. Concerned relatives send money, they talk to lawyers, they call the court, they write the court. Concerned relatives in my experience do not spontaneously violate the law of their own country and gratuitously mail a fake passport to somebody whom they know is facing serious criminal penalties in this country" (R.III-5-6).

In any event, the government offered no testimony or witnesses in support of its motion at the January 17, 1990 hearing, and for that matter, at sentencing.

Whatever the district court's experience with "concerned relatives" has been, there is simply *no evidence* to demonstrate and prove any complicity on the part of the defendant. Contrary to the statement in the Pre-Sentence Investigation Report, as previously quoted herein, the fake passport was *not* "sent to the defendant by his sister," but, was rather, in the process of being forwarded to Syder at the time of its interception. It obviously was not found in his possession, nor did the government offer any proof to estab-

lish that Mr. Syder had any knowledge regarding the existence of the same. Moreover, the conclusion of the Pre-Sentence Investigation officer that "his (Syder) actions in securing false documentation to flee suggests he has not (accepted responsibility)," is belied by the record. There is simply no indication nor proof that Mr. Syder secured or attempted to secure false documentation to flee. It is submitted that the fake passport's revelation, based upon the "facts" adduced by the government, did not warrant revocation of bond, much less an increase in the Total Offense Level.

Furthermore, it is beyond dispute that the attendant denial of a two (2) point decrease for Acceptance of Responsibility was based wholly on the obstruction of justice fiasco. The government, the defense and even the Pre-Sentence Investigation Report, early on, acknowledged that

> "the defendant offered voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense. He provided truthful admission to authorities of his involvement in the offense and related conduct. His testimony during the trial of his co-defendant (Ken Alipko) assisted the government in obtaining a guilty verdict by the jury. *The defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct*" (PSI, paragraph 18 at 5)(emphasis added).

The district court *never* stated, nor made a finding, that Mr. Syder had not accepted full responsibility for his conduct.

REASONS FOR GRANTING THE WRIT

Sentencing Guideline **§ 3C1.1**, entitled, Willfully Obstructing or Impeding Proceedings, provides that

> "[i]f the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by two (2) levels."

It has been held that "Section 3C1.1 is meant to cover cases of destroying or concealing evidence, testifying untruthfully or suborning perjury, threatening witnesses or lying to an officer during the course of an investigation." **United States v. Wilson, 904 F.2d 234, 235 (5th Cir. 1990).**

Whether "a defendant has obstructed the administration of justice is a factual question, and the district court's resolution of the question enjoys the protection of the clearly erroneous

standard." **United States v. Wilson, supra**, at 236, quoting **United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989)**. In **Franco-Torres**, the Court paused to address Application Note 2 to **§ 3C1.1** which provides that "[i]n applying this provision, suspect testimony and statements should be evaluated *in a light most favorable to the defendant*" (emphasis added). The Court held that

> "the note simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction. Such uncertainties may arise when the judge is unsure about which witness to believe, *or when the prosecution has failed to procure available evidence crucial to the resolution of a controversy*" at 801.

In the present case, a clear abuse of discretion has been shown. The government has not demonstrated any knowledge or complicity on Syder's part relative to the fake passport seized in New York City; moreover, the obtaining of a fake passport, even if proved, would not constitute an obstruction of the administration of justice, pursuant to **§ 3C1.1**. As the Court held in **United States v. Franco-Torres, supra**, a finding by a district court that a defendant has not accepted responsibility for his crimes will be affirmed "unless they are 'without foundation'" at 799. In that the denial of the two (2) point reduction was predicated *solely* on the aforementioned alleged obstruction of justice and in that the obstruction of justice contention has no basis in fact nor law in the present case, a clear abuse of discretion has been demonstrated, as well as a deprivation of Due Process of Law.

QUESTION FOUR RESTATED: The district court erred in failing to comply with Rule 11(c)(1), Fed. R. Crim. Pro., in that the defendant was not admonished as to "the effect of any ... supervised release term."

STATEMENT OF FACTS

During the rearraignment on counts one (1) through four (4), *no mention* of supervised release was made by the district court as to counts two (2) through four (4). Relative to count one (1), the only statement on the subject was the following: "[t]he penalty is from five to 40 years in prison and up to a $2,000,000 fine *plus some supervised release*" (R.II-5)(emphasis added).

REASONS FOR GRANTING THE WRIT

It is axiomatic that.it is incumbent upon the district court before accepting a plea of guilty or nolo contendere to inform the accused "of and determine that he understands inter alia, the 'maximum possible penalty provided by law, including the effect of any special parole term or term of supervised release.'" **United States v. Blair**, 902 F.2d 323, 324 (5th Cir. 1990). Moreover, even if the term of incarceration actually imposed, including the period of supervised release assessed, does not exceed the maximum sentence applicable to the offense or offenses in question, application of the harmless error rule is inappropriate.

In **United States v. Molina-Uribe**, 853 F.2d 1193, 1200 (5th Cir. 1988), the Court held that

> "[r]ule 11(c)(1) compels the court to inform the defendant not only of the mandatory minimum, but of the possible maximum post-incarceration period during which the special parole will be effective along with an explanation of how it will operate ..."

In the case at bar, while the *existence* of supervised release was mentioned by the district court during the Rule 11 colloquy, its *effect* and its possible *length* was not. The dynamics of how supervised release would impact or how it would operate upon the defendant's sentence was not broached at all by the district court. *See* **United States v. Tuangmaneeratmun**, 925 F.2d 797 (5th Cir. 1991) Moreover, the harmlessness found in **United States v. Reyes-Ruiz**, 868 F.2d 698 (5th Cir. 1989) is not applicable to the case sub judice. In **Reyes-Ruiz**, the district court therein provided the defendant with a range of supervised release but erred as to its length. **Reyes-Ruiz** was informed that the period of supervised release he was looking at was two (2) years, where in fact the correct amount was three (3). In the case at bar, *no* range was mentioned by the district court; furthermore, for a violation of **Title 21, United States Code, § 960(b)(2)**, the offense alleged in count one, and the only count that supervised release was mentioned by the district court, carries a period of supervised release of at least four (4) years with no statutory maximum. The failure of the district court to inform Mr. Syder of *any* period of supervised release and *how* it would operate vitiated his guilty

plea. *See also* **United States v. Dayton**, 604 F.2d 931 (5th Cir. 1979) (en banc), **cert. den.**, 100 S.Ct. 1080.

QUESTION FIVE RESTATED: The trial court abused its discretion in denying the Defendant's Motion to Allow Withdrawal of Plea of Guilty.

STATEMENT OF FACTS

As previously stated, on the same date the Defendant's Motion for Substitution of Counsel was filed - November 17, 1898 - a motion to withdraw the previously entered plea of guilty was also urged. The Motion to Allow Withdrawal of Plea of Guilty was summarily denied by the district court on December 28, 1989.

REASONS FOR GRANTING THE WRIT

Rule 32(d), Fed. R. Crim. Pro., governs the withdrawal of a plea of guilty or nolo contendere when "made before sentence is imposed, imposition of sentence is suspended, or disposition is had under **18, U.S.C., § 4205(c) ...**" As stated in **United States v. Carr**, 740 F.2d 339, 343 (5th Cir. 1984), **cert. den.** 107 S.Ct. 232, "[t]he standard for determining whether or not a defendant may withdraw his guilty plea prior to sentencing is whether 'for any reason the granting of the privilege seems fair and just.'" Before imposition of sentence, the motions should be construed liberally in favor of the accused. **United States v. Klein**, 560 F.2d 1236 (5th Cir. 1977), **cert. den.**, 98 S.Ct. 1259.

In **United States v. Carr**, **supra**, the Court delineated and identified factors that enter into the calculus concerning the propriety of a district court's decision concerning whether or not a plea of guilty or nolo contendere may be withdrawn:

> "(1) Whether or not the defendant has asserted his innocence;
>
> (2) whether or not the government would suffer prejudice if the withdrawal motion were granted;
>
> (3) whether or not the defendant has delayed in filing his withdrawal motion;
>
> (4) whether or not the withdrawal would substantially inconvenience the court;
>
> (5) whether or not close assistance of counsel was available;
>
> (6) whether or not the original plea was knowing and voluntary;

(7) whether or not the withdrawal would waste judicial resources; and, as applicable, the reason why defenses advanced later were not proffered at the time of the original pleading, or the reasons why defendant delayed in making his withdrawal motion," at 343-344.

When all the dust settles, and in the final analysis, review boils down in any given case to whether or not the trial court abused its discretion. **Carr** at 344, and authorities cited therein.

While the defendant readily concedes, as he must, that the district court is accorded "broad discretion" regarding motions to withdraw pleas of guilty, **United States v. Morrow**, 537 F.2d 120, 146 (5th Cir. 1976), **cert. den.**, sub nom., **Brennan v. United States**, 97 S.Ct. 1682 (1977), *at a minimum*, the district court should be required to weigh and consider the factors referred to in **Carr** and the record must reflect that the district court has in fact undertaken an analysis of the elements essential to the resolution of whether the "broad discretion" has been exercised without abuse.

Quite unlike **United States v. Carr**, **supra**, where the record demonstrated that the careful trial judge therein assiduously considered the aforementioned components in an evidentiary hearing conducted to resolve the matter, in the case at bar, not only was no evidentiary hearing held, but moreover, no findings of fact or conclusions of law were made. It simply cannot be said with any degree of assurance that Judge Hughes considered and weighed the factors that bear upon whether his "broad discretion" in denying the motion was abused.

For instance, in the present case, Syder asserted his innocence by arguing that the criminal acts were committed under duress. It is axiomatic that coercion or duress negates willful conduct and can constitute a defense to prosecution. **United States v. Housand**, 550 F.2d 818 (2d Cir. 1977), **cert. den.**, 431 U.S. 970. As to whether or not the government would suffer prejudice by the granting of the motion to withdraw the plea of guilty, not only is there no indication that this factor was considered or weighed by the district court, the government never offered any testimony or even a statement that prejudice would result. As far as the factor of "delay" is concerned, while fifty-two (52) days elapsed between

the entry of the plea and the filing of the Motion to Allow Withdrawal of Plea of Guilty, it is noted that the motion was filed on the very same day as the Motion for Substitution of Counsel; moreover, unlike the facts in **Carr**, where the motion therein was filed only three (3) days before sentencing, in the case at bar, the motion was filed some seventy (70) days before sentencing.

As to factor number 4, "whether or not the withdrawal would substantially inconvenience the court," no such finding was made by Judge Hughes, unlike the finding expressly made by Judge Mahon in **Carr** at 346. Factor 5 - "whether close assistance of counsel was available," is unknown in this record, as well. In **Carr**, Judge Mahon made a finding that prior counsel were "highly effective;" moreover, original counsel testified at the evidentiary hearing in **Carr** and laid on the appellate record their understanding, observations, positions, etc. Contrasted to this are the facts at bar. The motion and sworn affidavit in support thereof addressed communication problems that existed between Syder, a Nigerian national, and his previous counsel which prevented fair consideration of a bona fide defensive theory. Moreover, original counsel, Mr. Charles Medlin, was not required by the Court to testify or file an affidavit controverting anything alleged by Mr. Syder. For reasons known only to itself, the government tendered nothing to the Court in opposition to the motion to withdraw.

"Whether or not the original plea was knowing and voluntary" - the sixth factor - is problematic. While Judge Hughes stated on the record at sentencing that Syder "chose voluntarily to admit his guilty (sic), he admitted it" (R. VI-6-7), this, it is submitted, does not constitute a finding that the plea was knowing, voluntary and intelligent. Again, Judge Mahon, in rich detail, found that the pleas in **Carr** were knowing and voluntary, at 345. In any event, in light of the defensive theory of duress which came to light only *after* the Rule 11 proceedings had taken place, a genuine issue is raised as to whether Syder's pleas of guilty were knowing, voluntary and intelligent.

Finally, "whether or not the withdrawal would waste judicial resources," was never addressed by the district court in its order

denying the Motion to Allow Withdrawal of Plea of Guilty. While it is conceded, especially within the Southern District of Texas that the dockets are burgeoning and all of the judges are over worked, it is unfathomable that according a defendant his right to trial by jury could be viewed as a "waste of judicial resources." See and compare **United States v. Benivedes**, 793 F.2d 612 (5th Cir. 1986), **cert. den.** 107 S.Ct. 232, wherein an evidentiary hearing was held on the defendant's motion to withdraw plea of guilty and the record established that the government objected to the motion and the subject was broached for the first time during sentencing. As the Court of Appeals reasoned, "[c]rucially, there is no question of Benivedes being innocent or claiming innocence ...; **United States v. Ray**, 828 F.2d 399, 422 (7th Cir. 1987), **cert. den.**; **McChristion v. United States**, 108 S.Ct. 781, wherein it is stated, "courts should 'freely grant evidentiary hearings on such motions,'" citing, **United States v. Fountain**, 777 F.2d 351, 358, n. 3 (7th Cir. 1985), **cert. den.**, 106 S.Ct. 1232; and **United States v. Daniel**, 866 F.2d 749, 741 (5th Cir. 1989), wherein the record reflected extensive questioning of the defendant by the district court as to the reasons advanced in support of the motion.

It is submitted that the present record cannot support a finding that an abuse of discretion has not taken place. At the very minimum, the cause should be remanded for an evidentiary hearing wherein the government and more importantly, the district court, can explicate on the record the reasons and rationale supporting the denial of the motion. *Cf.* **Morgan v. United States**, 380 F.2d 915 (5th Cir. 1967), authorizing a remand to the district court for the entry of specific findings of fact and conclusions of law relative to Motions for New Trial.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court will grant his Application for Writ of Certiorari.

Respectfully submitted,

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Attorney for Defendant,
FESTUS SYDER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

FESTUS SYDER,

Petitioner,

V.

THE UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, GEORGE McCALL SECREST, JR., am a member of the Bar of this Court, hereby certify that on this 30th day of May, 1991, a copy of the Petition for Writ of Certiorari in the above entitled case was mailed first class postage prepaid, to Paula Offenhauser, Chief of Appellate Division, United States Attorney's Office, Post Office Box 61129, Houston, Texas 77208, counsel for the respondent herein and Mr. Kenneth Starr, Solicitor General of the United States, Office of the Attorney General, Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530.

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Attorney for the Petitioner,
FESTUS SYDER

APPENDIX A

Opinion of

the United States District Court

of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-2299
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FESTUS SYDER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 89 242 2)
(April 1, 1991)

Before KING, GARWOOD, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant Syder challenges his sentence for aiding and abetting the importation of heroin, conspiracy to possess heroin, and heroin possession. He argues that the district court improperly applied the enhancement for obstruction of justice, erred in refusing to afford him a reduction for acceptance of responsibility, failed to comply with the requirements of Federal Rule of Criminal Procedure 11(c), and improperly denied his motion to withdraw his guilty plea. Finding no error, we affirm.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and District Court Proceedings

When Syder, a Nigerian native, learned that his mother was seriously ill, he decided to return to Nigeria to attend to her. Being short of funds, he sought help from Ken Alipko, a Houston "friend" involved in heroin trafficking. Alipko purchased a airline ticket for Syder, asking only that Syder deliver a package to Alipko's "relatives" in Nigeria, and return with a package for him that the relatives would give him. Alipko provided Syder with the names of his contacts, and instructed him to call them on the scheduled day of his return.

Syder complied with Alipko's instructions, meeting Alipko's "relatives" at the airport. At their instruction, Syder followed them to a house, where he delivered Alipko's package containing $5,000 cash to them. In return, the men presented Syder with forty-five balloons of heroin, instructing him to swallow them. Syder initially protested on general principle, as well as on the ground that he did not know what was in the balloons. The men allegedly threatened him, withholding his visa and passport. Syder eventually acquiesced, swallowed the balloons, and returned home as scheduled.

Not surprisingly, Syder arrived at the New York airport dizzy and frightened. Noting his behavior, a customs agent asked

Syder if he had taken anything that day. Syder confessed that he had, and consented to an X-ray examination at the airport. When the X-ray revealed the balloons in his stomach, Syder was admitted to a hospital, and administered a laxative. The contents of the balloons he passed were analyzed and confirmed to be heroin.

Syder consented to cooperate with the agents in their efforts to arrest Alipko. Syder contacted Alipko, proffered a confected alibi for his delayed arrival, and arranged to have Alipko meet him at the airport. When Alipko and a companion arrived at the airport, they were arrested by federal agents.

Syder was indicted for one count of conspiracy to aid and abet the importation of heroin, one count of conspiracy to aid and abet the possession of heroin with intent to distribute, one count of aiding and abetting the importation of heroin, and one count of aiding and abetting the possession of heroin with intent to distribute, in violation of 21 U.S.C. §§ 952(a), 960(b)(2), 841 (a)(1), 841(b)(1)(B), and 846, and 18 U.S.C. § 2. Pursuant to a written plea agreement, Syder pleaded guilty to all four counts. The court sentenced Syder, on each count, to sixty months' imprisonment and five years of supervised release, to run concurrently. Syder filed a timely notice of appeal.

Rule 11

Syder contends that "[t]he failure of the district court to inform [him] of any period of supervised release and how it would operate vitiated his guilty plea." At the guilty plea hearing, the district court stated, regarding count one, that "the penalty is from five to forty years in prison and up to a two million dollar fine plus some supervised relcase." The court did not mention any term of supervised release with regard to counts two, three, or four.

In pertinent part, Federal Rule Criminal Procedure 11(c)(1) provides:

> Before accepting a plea of guilty . . ., the *court must address the defendant* personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any . . . *supervised release term*. . . .(emphasis added).

The government persuasively argues that the district judge properly informed Syder in open court that he faced the possibility of an imposed term of supervised release. The written plea agreement signed by Syder and his counsel specifically detailed the applicable punishment range, including the minimum term of supervised release.[2] Thus, the district

2 In that regard, we distinguish United States v. Andrews, 918 F.2d 1156 (5th Cir. 1990), a recent case vacating a sentence for non-compliance with Rule 11. In Andrews, the defendant was not advised of either the minimum or the maximum term of supervised release that could be imposed. The court rejected the

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court's failure to reiterate the supervised release range on the record did not negate the fact that Syder was fully advised of the consequences of his guilty plea.

Even if we were to find that the court failed to adequately detail the applicable punishment range, that variance alone will not mandate vacation of Syder's plea. Subsection (h) of Rule 11 provides that "[a]ny variance from the procedures required . . . that does not affect substantial rights shall be disregarded." Accordingly, the failure to fully comply with Rule 11 is not fatal if the variance was not "likely to have been a material factor affecting the petitioner's decision to plead guilty." Coody v. United States, 588 F.2d 1089, 1090 (5th Cir. 1979)(internal quotations and citations omitted).

This rule was recently applied by our court in United States v. Reyes-Ruiz, 868 F.2d 698 (5th Cir. 1989). In that case, the defendant was erroneously informed that the mandatory period of supervised release was two years instead of three. The court rejected Reyes-Ruiz' argument that the error vitiated his guilty plea, finding that the misstatement did not affect his decision to plead guilty. The court specifically distinguished United

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government's argument that the presentence investigation report (PSR) informed the defendants of the of the terms of supervised release, noting that the PSR is prepared *after* the plea is entered, rather than *before* it is entered. See Fed. Rule Crim. Pro. 11(c)(1) (imposing the requirement that all disclosures be made "before [the court] accept[s] a plea of guilty"). However, because Syder and his counsel signed the written plea agreement clearly disclosing the supervised release range *before entry of his plea*, the rationale of the Andrews holding is inapplicable.

States v. Molina-Uribe, 853 F.2d 1193 (5th Cir. 1988), *cert. denied*, 489 U.S. 1022, 109 S.Ct. 1145, 103 L.Ed.2d 205 (1989), a case in which a guilty plea was vacated for failure to comply with Rule 11. However, as the Reyes-Ruiz court noted, in Molina-Uribe the district judge failed to make *any* mention of the fact that the defendant could be sentenced to a term of supervised release. Thus, the court's *complete failure* to address a core concern of Rule 11 made the harmless error analysis inappropriate.

We conclude that the district court's failure to reiterate the applicable supervised release range could not have had any significant influence on Syder's decision to plead guilty. He was "caught in the act" of trying to smuggle heroin into the country, and the evidence of his guilt was overwhelming. *See* Reyes-Ruiz, 868 F.2d at 703-4. Any variance in the court's compliance with Rule 11 constituted harmless error.

Obstruction of Justice

Syder argues that the district court erroneously applied the two level enhancement for obstruction of justice provided in U.S.S.G. § 3C1.1, and erred in refusing to grant the reduction for acceptance of responsibility provided in U.S.S.G. § 3E1.1. We find no error.

The standard of review regarding guideline sentencing is statutorily defined. Syder's sentence must be upheld unless he demonstrates that it was imposed in violation of the law, as a result of an incorrect application of the guidelines, or was outside the range of the applicable guidelines and was unreasonable. 18 U.S.C. § 3742(e); United States v. Ebertowski, 896 F.2d 906 (5th Cir. 1990). This court must give "due regard to the opportunity of the district court to judge the credibility of witnesses" by accepting its findings of fact unless they are clearly erroneous. 18 U.S.C. 3742(e). Beyond even the clearly erroneous standard, this court must give "due deference to the district court's application of the guidelines to the facts." United States v. Woolford, 896 F.2d 99 (5th Cir. 1990).
Because the appellant asserts a ground of error not raised below, the judgment may only be reversed upon a finding of plain error. Fed. Rule Crim. Pro. 52(b); United States v. Yamin, 868 F.2d 130 (5th Cir.) *cert. den.*, ___ U.S. ___, 109 S.Ct. 3258, 106 L.Ed.2d 603 (1989).

The facts relevant to the obstruction and acceptance of responsibility issues show that while Syder was free on bond, Customs agents obtained possession of a recently issued Nigerian passport. Although the passport bore Syder's photograph, it was issued in the name of a third party. Accompanying the passport was a letter addressed to Syder from his sister advising him that she was sending the passport "in case of any urgency." Although Syder denied having any knowledge of his sister's efforts to

secure the false document, the district court concluded that Syder's access to friends and relatives wiling and able to help him elude justice warranted revocation of his release. In conjunction with those proceedings, Syder also filed multiple requests to withdraw his guilty plea, repeatedly maintaining that he was coerced into participating in the heroin smuggling scheme.

While it is doubtful Syder's challenges could overcome the high degree of deference we give the trial judge's findings of fact in sentencing matters, further inquiry into his contentions is unwarranted. Syder was sentenced to sixty months' imprisonment, the statutory minimum sentence. *See* 21 U.S.C. § 841 (b)(1)(B). Given the fact that the district court may only depart below the statutory minimum in extraordinary circumstances and upon motion of the government, neither of which were present in this case, we cannot conclude that Syder was prejudiced by the court's findings. *See* 18 U.S.C. § 3553(e).

Withdrawal of the Plea

Federal Rule of Criminal Procedure 32(d) provides that a court may permit withdrawal of a guilty plea prior to sentencing for any fair and just reason. The district court undertakes a totality of the circumstances inquiry, and its evaluation will not be disturbed absent an abuse of discretion. United States v. Carr, 740 F.2d 339, 344 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). In Carr, the court

enumerated seven factors which should be considered in evaluating a withdrawal motion. These include whether (1) the defendant has asserted his innocence, (2) the government would suffer prejudice, (3) the defendant has delayed his withdrawal motion, (4) the withdrawal would substantially inconvenience the court, (5) close assistance of counsel was available, (6) the original plea was knowing and voluntary, and (7) withdrawal would waste judicial resources. Id.

Although the district judge did not detail his reasons for denying the withdrawal motion, support for his decision may be discerned from the record. Syder coupled his delayed protestations of innocence with a allegations of duress, a defense he failed to raise, even with the close assistance of counsel, at an earlier stage in these proceedings.[3] Syder's motion to withdraw was less than prompt, as it was entered more than one month after rearraignment. Furthermore, the court originally found that Syder's plea was knowing and voluntary, having inquired as to whether it had been entered after consultation with counsel. Considering the totality of the circumstances, we find no abuse of discretion.

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[3] Syder also complains about the district court's failure to order an evidentiary hearing on his duress claim. We are unmoved. Syder's duress allegations were unsubstantiated and conclusory. In such a context, the Seventh Circuit has held that an evidentiary hearing is unnecessary. *See* United States v. Fountain, 777 F.2d 351, 358 (7th Cir. 1985) *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1232, 89 L.Ed.2d 341 (1986).

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.